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No. 06-6407

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2005

SCOTT LOUIS PANETTI,

Petitioner,

V.

NATHANIEL QUARTERMAN,
Director, Texas Department of Criminal Justice,
Correctional Institutions Division,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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CAPITAL CASE

QUESTION PRESENTED

DOES THE EIGHTH AMENDMENT PERMIT THE EXECUTION OF A DEATH ROW INMATE WHO HAS A FACTUAL AWARENESS OF THE REASON FOR HIS EXECUTION BUT WHO, BECAUSE OF SEVERE MENTAL ILLNESS, HAS A DELUSIONAL BELIEF AS TO WHY THE STATE IS EXECUTING HIM, AND THUS DOES NOT APPRECIATE THAT HIS EXECUTION IS INTENDED TO SEEK RETRIBUTION FOR HIS CAPITAL CRIME?

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PETITION FOR WRIT OF CERTIORARI TO
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Petitioner Scott Louis Panetti asks that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

CITATION TO OPINIONS BELOW

The decision of the United States Court of Appeals for the Fifth Circuit, *Panetti v. Dretke*, 448 F.3d 815 (5th Cir. 2006), is attached to this petition as Appendix A. The memorandum opinion of the district court denying Mr. Panetti's competency-to-be-executed claim, *Panetti v. Dretke*, 401 F. Supp.2d 702 (W.D. Tex. 2004), is attached as Appendix B.

JURISDICTION

The Court of Appeals entered its judgment on May 9, 2006. The Court of Appeals denied Mr. Panetti's timely petition for rehearing en banc on June 8, 2006. The order denying rehearing is attached as Appendix C. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254, Mr. Panetti having asserted below and asserting in this petition the deprivation of rights secured by the United States Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Eighth Amendment to the United States Constitution, which provides that, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

2. This case involves the Fourteenth Amendment to the United States Constitution, which applies the Eighth Amendments to the states, and which provides, in relevant part, that "No state may deprive any person of life [or] liberty . . . without due process of law."

STATEMENT OF THE CASE

While the issue in this case now focuses on competency to be executed, it is important for this Court to understand the severity of the mental illness that Mr. Panetti has experienced for 25 years and its manifestations at every stage of his criminal proceedings. There is no dispute that Mr.

Panetti is profoundly mentally ill; the dispute centers around the legal consequences of his mental illness. Although unorthodox, this lengthy Statement of Facts will provide context and assist the Court in assessing the question at the heart of this case: whether Mr. Panetti's psychotic thought processes affect his ability to appreciate the connection between his crime and his punishment.

A. Mr. Panetti's History of Mental Illness

In the decade leading up to the crime, Mr. Panetti was hospitalized 14 times in six different institutions for schizophrenia, manic depression (bipolar disorder), auditory hallucinations, and delusions of persecution and grandiosity.[1] He was involuntarily committed to the Kerrville (Texas) State Hospital in 1981. He was diagnosed as paranoid and hostile toward his family. In April 1986, he was admitted to the Starlite Village Hospital and diagnosed with schizophrenia. He spoke incoherently and was actively hallucinating: He claimed he killed the devil and exorcized his home. He was transferred to the Kerrville State Hospital for further evaluation and was diagnosed with paranoia and schizophrenia. He had nailed shut the curtains in his home and buried some of his furniture in the backyard, because he believed that the devil was in the furniture. He was transferred to the Waco Veteran's Hospital in May 1986, diagnosed with chronic undifferentiated schizophrenia, and treated with antipsychotic medications.

Mr. Panetti moved to Wisconsin and was admitted to Tomah Veteran's Hospital in July 1986 after failing to comply with his medication regimen. He was again diagnosed with schizophrenia. He was transferred to Cumberland Memorial Hospital and diagnosed with depression, brain dysfunction, delusions, auditory hallucinations, and homicidal ideation toward his family. He was

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[1] Mr. Panetti's medical records were admitted at the second competency-to-stand-trial proceeding in 1994 as State Exhibits 1 through 6.

then transferred to Northern Pines Unified Services Center in August 1986 and diagnosed with depression and suicidal ideation. Mr. Panetti experienced hallucinations, seeing the devil on a wall. He hallucinated blood coming out of the walls. He washed the walls and his house to get rid of the devil. Mr. Panetti appeared to be on the edge of a psychotic break. He was concerned that he might hurt his family.

Upon his return to Texas, Mr. Panetti was again hospitalized at Starlite Village in October 1986 and again diagnosed with schizophrenia. He was transferred to the Kerrville Veterans Hospital in November 1986 and diagnosed with schizoaffective disorder.

In 1990, Mr. Panetti was involuntarily committed to the Kerrville State Hospital for homicidal behavior: He had threatened to kill his wife, baby, father-in-law, and himself. The citizens of Kerrville, Texas, were plotting against him, he believed.. In 1992, after threatening his family and suffering from delusions of grandiosity and psychotic religiosity, he was admitted to the Kerrville Veterans Hospital and diagnosed with schizoaffective disorder. During this hospitalization, the records revealed the possible presence of three personalities that he had given names to.

In the midst of his severe mental health problems, he and his wife separated, and she took their three-year-old daughter and began living with her parents. On September 8, 1992, Mr. Panetti sawed off the barrel of a shotgun, shaved his head, dressed in Army fatigues, went to the residence of his parents-in-law, Joe and Amanda Alvarado, and shot them in front of his wife and daughter. He then took his wife and daughter to his bunkhouse. He eventually released them unharmed. When the police surrounded his bunkhouse, Mr. Panetti changed into a suit and surrendered to the police.

B. Competency-to-Stand-Trial Proceedings

Based on Mr. Panetti's lengthy history of severe mental health problems, a competency trial

was held in 1994. After the jury deliberated for nearly twelve hours, the judge declared a mistrial. 10 RR 371, 379.[2] Notes in the record indicate that the jury deadlocked 9-to-3 in favor of incompetency. 3 CR 290. A little more than a month later, after the trial court ordered a change of venue, a new jury heard nearly identical evidence about Mr. Panetti's competency to stand trial.[3]

At the second competency trial, Mr. Panetti's defense counsel, Richard Mosty, testified that, under stress, Mr. Panetti would become delusional and unresponsive to his questions. During conversations, Mr. Panetti often said that he felt possessed by demons and had been visited by angels and Jesus. Mosty testified that he could not have a meaningful conversation with Mr. Panetti about the legal issues in the case. He concluded that Mr. Panetti was not competent to stand trial. 13 RR 20-50.

Dr. Richard Coons, a forensic psychiatrist, performed a competency evaluation. He found Mr. Panetti suffered from schizophrenia. Dr. Coons testified that Mr. Panetti decompensates when under stress, causing his thinking to become tangential, circumstantial, and inefficient. As an example of Mr. Panetti's disordered thought processes, Dr. Coons listed the topics Mr. Panetti talked about during one of their meetings:

> [H]e began to talk about scripture and then he began, with no prompting from me, no interjection from me whatsoever, he went from scripture to being in jail in Bell

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[2] Citations to the reporter's record of the capital murder trial and the competency-to-stand-trial proceedings are noted as "__ RR __." Citations to the clerk's record of the capital murder trial and competency-to-stand-trial proceedings are noted as "__ CR __." Citations to the competency-to-be-executed hearing held in federal district court are noted as "__ FH __."

[3] The parties presented virtually the same evidence at both competency trials. All but one of the witnesses testified at both competency trials. Only Dr. Michael Lennhoff, a defense expert at the first competency proceeding who testified that Mr. Panetti had the ability to rationally understand the proceedings and consult with his lawyers, did not testify at the second competency proceeding.

> County to the way prisoners look, to the Waco Veterans Administration Hospital. He described patients. He talked about lightning, talked about having been drowned a couple of times, the Lord wants me to help a person, talked about the meaning of life, suicidal thoughts, his mother's prayers, so much to be thankful for, problem marriages, women he's dated, rodeo, drinking, tequila in old Mexico, the YO Ranch, his battle with the bottle, a mescal dream of a bottle with worms in it, dope dealer sitting in the courtroom, Luke, Chapter 13 Verse 33, new saddle, boots, boot maker is dead, hobbles for a horse, an old piece of cotton rope and riding with a lead shank.

13 RR 63-64. According to Dr. Coons, Mr. Panetti had other distractions besides his disordered thinking that prevented him from rationally assisting his lawyers: He hears some voices that may have "particular religious significance" and others that are "more precise and commanding." *Id.* at 65. Dr. Coons concluded that Mr. Panetti could not consult with his attorneys with a reasonable degree of rational understanding, and that Mr. Panetti did not have a rational understanding of the proceedings. *Id.* at 59-85.

Dr. E. Lee Simes, a psychiatrist, testified Mr. Panetti is clearly mentally ill, that his thought processes are tangential, and that he most likely suffers from schizophrenia. Dr. Simes concluded that Mr. Panetti was competent to stand trial. However, Dr. Simes admitted on cross-examination that he recalled Mr. Panetti's delusional, irrational thinking about "gold dust coming down and spiritually filling him," "the demons Dagon and Beelzebub," and "the tinglies." 13 RR 153-54. Dr. Simes also recalled Mr. Panetti's delusional thoughts about the four personalities inside him and his belief that the purpose of the competency trial was to provide him with the proper medication. Dr. Simes admitted that when he asked Mr. Panetti about the role of his lawyers, he never gave a rational response. Dr. Simes also conceded that when he testified at the first competency trial, he said that Mr. Panetti believed the President was Ford or Nixon. Dr. Simes agreed that stress exacerbates schizophrenia and Mr. Panetti's delusions could make him incapable of assisting his attorneys. Dr.

Simes testified that, as the capital murder trial progressed and the stress increased, it was "quite possible" that Mr. Panetti would decompensate. *Id.* at 174.

Mr. Panetti was found competent to stand trial. 13 RR 206-07.

C. Mr. Panetti's Decision to Waive the Assistance of Counsel

On April 1, 1995, Mr. Panetti had a "revelation" that he was a "born-again April fool" whose schizophrenia had been cured by God. 15 RR 9.[4] He refused to take any more antipsychotic medication.[5] Less than three months later, Mr. Panetti asked the trial court to allow him to represent himself. 15 RR 14-16, 26. His attorneys told the judge that they did not feel Mr. Panetti was competent to stand trial, did not understand the process, and should not represent himself. *Id.* The prosecution objected to allowing defense counsel to withdraw, stating:

> I don't think the State could agree to this, if that's an issue with the Court, but I did want to put that on record. We are concerned about protecting the Defendant's rights. I think they would be best served by leaving counsel in based on the record we have heard today.

Id. at 23-24. Based on the jury's finding that Mr. Panetti was competent to stand trial, the court ruled that he could represent himself. *Id.* at 29-30.

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[4] Mr. Panetti described this "revelation" in his opening statement to the jury at the guilt-innocence phase of his capital murder trial:

> In my year in the Waco Branch Davidian expert's cell in Bell County, I didn't hear from my previous law firm, and I got paranoid that I wasn't being told or lost a chance to appeal the decision of the illegal evidence that was found illegal and then found legal, and I came to the conclusion after my medicine was taken from me and I went into the paranoia and the thought disorder that it depended on me, the April fool, as I consider myself the born again April fool, not saying being born again bars someone from being able to sin, but I depended on the Lord to do for me what the medicine wasn't doing.

31 RR 31-32.

[5] Mr. Panetti has not taken any antipsychotic medication since that day.

D. Mr. Panetti's Refusal to Take Antipsychotic Medication

Mr. Panetti stopped taking any medication to alleviate his symptoms of schizophrenia on April 1, 1995. He began representing himself three months later. However, Mr. Panetti was taking antipsychotic medicine when he was found competent to stand trial. The undisputed evidence presented at the competency-to-stand-trial proceedings showed that his schizophrenic symptoms (delusions, hallucinations, tangentiality, and circumstantial thinking) markedly diminished when he was taking his medication. 13 RR 67-70 (testimony of Dr. Richard Coons); *see id.* at 74 (testifying that medication and hospitalization have had a "positive influence" on Mr. Panetti); *id.* at 80 (testifying that Mr. Panetti "gets better" when he is treated). Dr. Coons stated that Mr. Panetti was currently being treated with such a heavy dosage of Trilafon that it would render somebody without a severe mental illness dysfunctional. *Id.* at 69, 71. Without any medication, according to Dr. Coons, Mr. Panetti would be "very psychotic," "tremendously paranoid," and "more delusional." *Id.* at 71. Dr. Coons believed, however, that Mr. Panetti's condition would improve with better treatment and more potent medication than Trilafon. *Id.* at 76-77; *see id.* at 80 (testifying that Mr. Panetti "is not being treated with the heavy-duty meds that I think he should be").[6] Dr. E. Lee Simes,

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[6] Dr. Coons's testimony at the first competency proceeding was substantially similar. He testified that Trilafon is "a medium range, medium intensity antipsychotic medication" that is not one of the "more powerful, more potent agents" for treating someone in Mr. Panetti's condition. 10 RR 226. He believed that Mr. Panetti needed to be treated with medication "much stronger than Trilafon." *Id.* at 228. Nevertheless, Dr. Coons testified that without the strong dosages of Trilafon, Mr. Panetti "would hear more voices, he'd become more delusional, he would have more strange ideas. His thinking would be even more fragmented and less intense. He would have even less control over his thoughts and behavior." *Id.* at 234-35. Dr. Coons also noted that Mr. Panetti's condition usually improves when he has been hospitalized and properly medicated. *Id.* at 228, 247.

Dr. Lennhoff, who testified only at the first competency proceeding, also recommended that Mr. Panetti be treated with newer, more powerful medication to determine if his condition would improve. 9 RR 257.

the State's expert who testified at the 1994 competency hearings, agreed with Dr. Coons that Mr. Panetti's condition would worsen if he were not taking any antipsychotic medication. 9 RR 279.[7]

After Mr. Panetti began representing himself, he asked the judge on several occasions that he be given the proper medications and an opportunity to see a psychiatrist. At a pretrial hearing on August 14, 1994, Mr. Panetti said, "I haven't had the proper medication since April of '91 and I'm pretty much convinced of my healing and a need not for it, and if I was offered a state of the art new medication where I was offered just old stuff, I may consider a medication that may help my conduct in court from here on . . . ." 19 RR 42; *see id.* at 30 ("All I'm asking is for a simple lick out of the shoot, such as medicine, such as treatment, not to delay, and we'll deal with the witnesses' subpoena and continuance and forgive me for rambling on, Your Honor."). The judge denied Mr. Panetti's motion for continuance. *Id.* at 60-61. In that same hearing, the judge said, "the next motion is a motion for treatment of mental illness and I think I have already addressed that. That's outside of my jurisdiction, and that's denied." *Id.* at 26. At a pretrial hearing on September 6, 1995, Mr. Panetti mentioned his desire to speak with a psychiatrist. The appointment was scheduled for September 12th, the same day the judge had set for the case-in-chief to begin. The judge responded, "I'm hesitant to do anything that's going to get us off track for going, you know, 9:00 to 5:00 every day on the trial. If it is after 5:00, I don't have a problem, and then, as I told you yesterday, if you can change that appointment to the 11th, that would really be the best thing." 30 RR 8-9. Finally, on

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[7] Dr. Arambula stated in the report he prepared for state habeas counsel that Mr. Panetti's refusal to take any medication in the months leading up to his trial, coupled with "the stress of a trial upon any defendant, much less one representing himself," would lead any clinician to "reasonably foresee that Mr. Panetti's symptoms would worsen." Affidavit of Michael Arambula, M.D., R.Ph. at 5-6. In this unmedicated state, Mr. Panetti "deteriorate[d] to such a level that he was subject to persecutory delusions and severe disturbances in his thinking (and ability to communicate with others). *Id.* at 7.

September 12, 1995, the first day of the trial, Mr. Panetti requested a continuance. He expressed his concerns about getting a non-drowsy medication so that he would be able to think clearly, because "I had problems with certain jurors that I couldn't think clearly enough to ask them a certain question and I declined to ask those questions." He argued that he needed to have medicine and see a psychiatrist so that he would "be prepared to cross-examine, to think clearly, to cross-examine witnesses clearly." 31 RR 13-17. The trial court denied Mr. Panetti's request for a continuance.

E. The Capital Murder Trial

Representing himself, Mr. Panetti raised a defense of not guilty by reason of insanity. He dressed in a "Tom Mix" outfit like a cowboy in an old television Western. He wore a cowboy hat in court that hung on a string over his back. leather suede pants tucked into his cowboy boots, and a burgundy double-folded Western shirt with a bandana. He peppered his remarks to the court and questions to the witnesses with phrases like "bronc steer," "pardner," "run away mule," "buckaroo," and "hosses." He made bizarre and inappropriate statements to the jury; went on irrelevant, irrational, and illogical reveries (tangential thinking); exhibited sudden changes in his thought processes (flight of ideas); asked questions that were incomprehensible or not coherently connected together (loose associations); rambled incessantly and in such extraneous detail that the main point was obscured (circumstantial thinking); perseverated; recited senseless, fragmented prose; badgered the judge, the prosecuting attorney, and witnesses; and resisted the judge's repeated efforts to control his conduct.

Several excerpts from various portions of the trial provide compelling evidence of the severity of Mr. Panetti's mental illness:

- Mr. Panetti applied for over 200 subpoenas, including John F. Kennedy, Pope John

Paul II, and Jesus. He listed Jesus's address as "everywhere" and the county of residence as "Heaven." *See* 36 RR 1207 ("I didn't want to go subpoena crazy and I turned the Pope loose and J.F.K. and I never subpoenaed them, but Jesus Christ, he doesn't need a subpoena. He's right here with me, and we'll get into that.").

- Mr. Panetti made bizarre comments to the panel of prospective jurors during general voir dire:

  The death penalty doesn't scare me, sure but not much. Be killed, power line, when I was a kid. I've got my Injun beliefs as a shaman. I sent the buffalo horn to my sister. Adjustment, Jesus wrote. I was born in the North woods in a reservation hospital and my granddad was a justice of the peace and he sobered up the doctor and the doctor was half sobered and they delivered me and my mom had a bad sickness in her milk and they wondered why I wasn't dead, and a lot of beatings I took from the kids that show me had prejudice, which I don't have any prejudice, and they said this about me in the newspapers in the beginning, but I don't love Injuns and Mexicano, and Mexicano know, but I suffered a lot of reverse prejudice from Colored people, which is rare, darn rare, but I was named "He who doesn't cry" because I didn't cry when I should have, and I must admit, though, in Gillespie County Jail when I was in my little suicide box where there was an old boy committed suicide, I went through about a week of pretty much scuba diver's tears; although, I don't scuba.

  RR vol. 21 at 87-88.

- He asked rambling, nonsensical questions of trial witnesses:

  Mr. Panetti: Canteen where – I was expecting the whole list to question, Donna Stanley, educated, expert.

  The Court: You need to ask a question, Mr. Panetti.

  Mr. Panetti: I hope you don't find any more – well, Dr. Bayardo, he didn't find any offense when I mentioned "Quincy." We didn't say whether we liked the show, but we mentioned about the beginning where the cops got sick, and I asked him that naturally for a reason, but I didn't ask him if it made the job popular or anything, but when it comes to dealing with blood, his autopsy, and the crime scene, your expert evidence, autopsy, crime scene. I'm thinking out loud, so I don't ask you questions that you're – well, it would be like asking a rodeo hand what cutting a horse means. They might know it all, but I just – have you got those pictures of the glow-in-the-dark?

32 RR 443.

- The judge repeatedly warned Mr. Panetti to ask relevant questions:

The Court: Well, can you tell me how it's going to be relevant, Mr. Panetti? I'm not sure how your belt buckle is relevant to this issue.

Mr. Panetti: Your Honor, I beg the pardon of the Court, but if I was to – not a gambler, but I found in the jury selection and whatnot that it was compared, legal business was. In other words, if I go ahead, or if I would have requested this buckle brought out earlier, or if I would have requested it later, in light of the fact that it may not be brought in, I would have been telling the District Attorney, such as subpoena list that had to change because some of his witnesses weren't called that I had to recall.

The Court: Mr. Panetti, at this time I don't see how the belt buckle is relevant to any issue this jury is going to determine and so if you can't explain the relevance to me, I'm going to sustain the objection. Can you explain to me how the belt buckle is relevant to any issue in this case?

Mr. Panetti: Yes, I can, Your Honor. It has to do with jailhouse religion. It has to do what some men would do for a belt buckle. It has to do with the difference between a rodeo hand and a buckaroo poet. It as to do with my whole outlook and this will come up, God forbid, in the punishment stage.

Before religion, when you got religion, prior religion, church member, I'm going to have witnesses from the church come in and Chaplain Bob got on his knees and read that buckle, Ranger Cummings, read this buckle and people go out of their way. At rodeos cowboys make sure they look at your buckle without you looking at it.

33 RR 755-56.

- Mr. Panetti took the stand in his own defense at the guilt-innocence stage of the trial and proceeded to tell his life story, including: his birth, his mother's milk sickness, his parents fighting, his near-drowning, his clothes and haircut, his tattoo, a horse flipping over on him and his castrating that horse later, working with his father, farming, receiving military fatigues after his uncle returned from Vietnam, a school play, a girlfriend who got him into rodeo, his sexual experiences, his job as an artificial insemination technician for cattle, drinking, smoking marijuana, horses his

family owned when he was growing up, riding a minibike, watching his friend who was a diabetic injecting insulin, his girlfriend's abortion, being a cowboy and bull rider, an automobile accident he was in, going into the Navy, intelligence training, being drugged with LSD and PCP in the Navy by a fellow soldier, his brother's wedding, taking cocaine with a nurse after leaving the Navy, talking with a man who worked for Frederick's of Hollywood who wanted him to model lingerie, his marriages, his near-electrocution, killing a rattlesnake, being an extra in a movie, attending cosmetology school and cutting his sister's hair, accidentally being shot in the leg, and seeing the devil.

37 RR 1447-1556.[8]

- Despite the trial court's repeated orders to testify only about certain topics, Mr. Panetti's perseveration prevented him from obeying them:

The Court:	Mr. Panetti, get to the LSD incident.
Mr. Panetti:	And –
The Court:	Right now.
Mr. Panetti:	Right now. I went – now, my military records, sir, this is thick, and I'm going to make it that thick, but I'm just going to briefly move to the LSD incident.
The Court:	Go straight to it right now.
Mr. Panetti:	Okay. They – they said, "You're so highly qualified."
The Court:	No, straight to the LSD incident.
Mr. Panetti:	Well, sir –
The Court:	Go straight to the LSD incident.
Mr. Panetti:	That was my third and final duty station, but right in the middle I'll just quickly touch a short stint.
The Court:	No, don't touch on the short stint. Go straight to the LSD incident.
Mr. Panetti:	First time I requested to see a psychiatrist, I thought that I might be disciplinaried, and they – I didn't know how to go about that. Straight to, okay, straight to. Your Honor, may I just briefly touch on the brief situation of – briefly to that incident?

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[8] The judge admonished Mr. Panetti about the relevance of his testimony:

> Mr. Panetti, for the last 35 minutes we have been listening to Navy stories that I do not deem relevant. I am not going to let you ramble and tell the jury your life story. I wouldn't let the State have a witness on and just ramble and tell his life story. I'm going to insist that you get to issues that you think this jury can use in making their determination of whether or not you're guilty or innocent of the charges against you.

37 RR 1478.

The Court: No.
Mr. Panetti: It has relevance, sir.
The Court: No.
Mr. Panetti: It does have relevance, sir.
The Court: Go straight to the LSD incident.
Mr. Panetti: They said –

(At which time there was a long pause.)

Mr. Panetti: They said – they said, "What do you want to do?" I said, "Just let me run heavy equipment.", and they said, "No, you can't. That's full up. You cant be in HCB."
The Court: Mr. Panetti –
Mr. Panetti: And I'm coming right up to my first taste of LSD.
The Court: Stop. Ladies and gentlemen, we're going to recess –

37 RR 1476-77.

- Assuming the personality of "Sarge," Mr. Panetti testified about the crime:

Joe, Joe, Amanda, no talking, no words, knife, Sarge knife, threatened, scared, fight, no. Sarge shoots, CC. Sarge turns, shoots, boom, boom. Where is Amanda? Mom is dead. Joe look up. No. Where's Birdie? Sonja bedroom. Birdie. Joe. Where's Amanda. Sarge, Sarge, left a bullet. Scott, what? Scott, what did you see Sarge do?

Fall. Sonja, Joe, Amanda, kitchen. Joe bayonet, not attacking. Sarge not afraid, not threatened. Sarge not angry, not mad. Sarge, boom, boom. Sarge, boom, boom, boom, boom. Sarge, boom, boom.

Sarge is gone. No more Sarge. Sonja and Birdie. Birdie and Sonja. Joe, Amanda lying kitchen, here, there, blood. No, leave. Scott, remember exactly what Sarge did. Shot the lock. Walked in the kitchen. Sonja, where's Birdie? Sonja here. Joe, bayonet, door, Amanda. Boom, boom, blood, blood.

Demons. Ha, ha, ha, ha, oh, Lord, oh, you.

The Court: Mr. Panetti, let's stop.
Mr. Panetti: You puppet.
The Court: Mr. Panetti, we're going to take about a five-minute recess.

37 RR 1544-46.

- Mr. Panetti delivered an incoherent guilt-innocence phase closing argument:

> Ladies and gentlemen of the jury, I think that State will have more than a few comments, judging by the time allowed to respond to mine. Briefly, in 45 minutes you might wonder a little bit about when I testified, and Scott and Sarge and who talked and who talked about who and who talked about what and in light of Dr. Simes not being here, he did leave this letter and it will explain that and it has something to do about me showing you the tattoo and introduce you to Will, and I don't tell you Texas Will and Chaplain or Montana Will and go into that, and the evidence will, if you read that, look over that, might explain that. I wish you not to mistake charisma for sanity. Charisma is by definition a spiritual gift.
>
> Briefly touching on just a few of the – demon dabbling is my understanding just a nonphysical being hostile to humans and God, caused by bad influences and disease, mental distress on human beings.
>
> *See* 38 RR 1645-63.

- Mr. Panetti delivered an incoherent punishment phase closing argument:

> You know, just to touch on the spat and wasn't cuffed, but I was bronc and Sheriff Kaiser and I had a talk, well, of the fact that I'm no longer American citizen, and because of my buckaroo case. I believe city people love horses, too, and I don't consider myself anything above or below anyone, but I do consider myself me, and when I made my last confession at Veterans Hospital to Father De la Garza, I wasn't Catholic.
>
> *See* 39 RR 85-90.

On September 21, 1995, the jury found Mr. Panetti guilty of capital murder. The next day, the punishment phase began. The prosecution called two witnesses, including Dr. James Grigson, who testified that antipsychotic medications would not reduce the likelihood that Mr. Panetti would be a future danger to society. 39 RR 54, 60. Mr. Panetti called only one witness, his stand-by counsel. He was sentenced to death the same day. 7 CR 1033-38.

Dr. Wolfgang Selck, a psychiatrist who treated Mr. Panetti at the Starlite Village Hospital in 1986, and whom Mr. Panetti called as a witness, watched a day-and-a-half of the trial before he testified. Dr. Selck later provided state habeas counsel with an affidavit setting out his observations

of Mr. Panetti's behavior in the courtroom:

> Scott was acting as his own attorney from his paranoid fear that the attorneys were out to get him. Due to the paranoia, Scott was lead [sic] by his mental illness to demand to represent himself. Since Scott could not trust lawyers to represent him, he had to represent himself. This decision was a facet of his paranoia and severe mental illness.
>
> * * * *
>
> As a psychiatrist I also observe the emotion rather than the contents of the sentence. The emotion that Scott displayed was also a clear sign of mental illness and incompetence. To the lay person and the jury, it may have appeared that Scott was capable because he appeared normal in the sense that he could talk in sentences, ask questions, and argue. One reason that some mental illness is difficult to determine is because paranoid people are usually sharp in certain areas. A paranoid schizophrenic may be alert to time and place, but, this has to be contrasted with the verbal rambling where the person is lost in irrelevant talk or where the person has fixed ideas.

Affidavit of Wolfgang Selck, Ph.D., at 3-4.

Mr. Panetti also called Dr. F.E. Seale, another psychiatrist who treated Mr. Panetti at the Starlite Village Hospital in 1986, to testify at the capital murder trial. Dr. Seale had an opportunity to watch Mr. Panetti in court for an entire day, and later gave state habeas counsel an affidavit containing his opinion about Mr. Panetti's behavior:

> When I observed Scott in September 1995 at his trial, I would describe Scott as delusional.
>
> * * * *
>
> My main impression was why was the Judge allowing this crazy man to defend himself. I thought to myself, "My God. How in the world can our legal system allow an insane man to defend himself? How can this be just?" I not only thought Scott was incompetent, but, that it was not moral to have him stand trial. It was terribly wrong. I did not know that our legal system would allow an insane man to represent himself in his own trial.
>
> * * * *
>
> Scott was acting out a role that was a delusion of a specific war hero. He described the shooting in the role of Sarge. He acted out the role in the Courtroom. Scott was totally out of touch with reality. He had no knowledge of the effect of his actions in Court. I think that Scott was enjoying playing the role of Sarge. This is a sure sign of obvious mental illness.

> The main thing that I specifically remember about Scott was his manner and the grandiosity of his ideas. Scott enjoyed being an attorney describing his role in the crime. The Court allowed Scott to perform.

Affidavit of F.E. Seale, Ph.D., at 1-2.

Dr. Michael R. Arambula, a forensic psychiatrist, provided state habeas counsel with an evaluation of Mr. Panetti's mental status at the trial. He reviewed the medical records, conducted a clinical interview, and read the trial transcript. Dr. Arambula's report contains several insights about Mr. Panetti's behavior during the trial:

> There are numerous incidents in Mr. Panetti's trial when he exhibits flight of ideas and grandiosity (symptoms of mania), but there are even more examples of looseness of associations and tangentiality in his thought processes (symptoms of Schizophrenia). Example after example of the court repeatedly redirecting Mr. Panetti to stay on line with relevant evidence is a stark example of how he cannot think and communicate rationally because of his underlying disease. It is certainly understandable from a lay point of view how frustrating it was for the court, particularly not appreciating that Mr. Panetti's disease was the reason for his inability to comply with the judge's requests.
>
> * * * *
>
> It is clear to this examiner that Mr. Panetti retains personal choice throughout his trial proceedings. This is not unexpected, since even the most psychotic individuals I have seen in my career still have personal preferences and choices. However, the clinical crux of a reasoned choice is determined by whether a person's psychotic thought process is involved in that decision-making process.
>
> * * * *
>
> Mr. Panetti's testimony indicates that he is cognitively impaired by his own thought disorder. Even though Mr. Panetti's choice to represent himself is a personal decision, his ability to carry out this personal decision is still limited by his psychotic disease. Mr. Panetti's thought disorder renders his thinking incoherent, illogical, and goal non-directed.

Affidavit of Michael R. Arambula, M.D., R.Ph., at 6 (emphasis omitted).

F. The Appellate and Post-Conviction Proceedings

Mr. Panetti agreed to be represented by counsel on direct appeal. Appellate counsel raised several points of error related to Mr. Panetti's competency. The Texas Court of Criminal Appeals

rejected the claims and affirmed Mr. Panetti's conviction and sentence. *Panetti v. State*, AP-72,230 (Tex. Crim. App. Dec. 3, 1997) (unpublished). This Court denied his petition for a writ of certiorari on October 5, 1998. *Panetti v. Texas*, 525 U.S. 848 (1998).

Mr. Panetti, represented by counsel, filed his state application for writ of habeas corpus on June 19, 1997.[9] In it, he raised several claims related to his competency. Adopting verbatim the findings and conclusions authored by the District Attorney, the trial court recommended that habeas relief be denied. The Texas Court of Criminal Appeals adopted the trial court's findings and conclusions. *Ex parte Panetti*, Writ No. 37,145 (Tex. Crim. App. May 20, 1998) (per curiam) (unpublished).

Mr. Panetti filed his federal habeas petition on September 7, 1999. The district court held that Mr. Panetti had not exhausted his claims that he was incompetent to stand trial and that the judge should have held an additional hearing to determine his competency. *Panetti v. Johnson*, No. A-99-CA-260-SS (W.D. Tex. Mar. 9, 2001) (unpublished). The Fifth Circuit found that Mr. Panetti had properly exhausted the competency claims, but the appeals court then denied them on the merits. *Panetti v. Cockrell*, No. 01-50347 (5th Cir. Jul. 19, 2003) (unpublished).

G. Competency-to-Be-Executed Proceedings

After the conclusion of the federal habeas proceedings in the Fifth Circuit, the state trial court set an execution date for February 5, 2004. Counsel for Mr. Panetti filed a motion pursuant to Article 46.05 of the Texas Code of Criminal Procedure, asserting that *Ford v. Wainwright*, 477 U.S.

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[9] In September 1996, the trial court held a hearing to determine whether Mr. Panetti was indigent and desired the appointment of state habeas counsel. Mr. Panetti stated that he did not feel competent to decide whether he wanted to represent himself or request court-appointed counsel. The judge found that any waiver given at that time would "not be voluntary and intelligently made" and appointed counsel to represent Mr. Panetti in state habeas proceedings. 43 RR 9.

399 (1986), prohibited Mr. Panetti's execution. The federal district court later stayed the execution to allow the state court to adjudicate the Article 46.05 motion. On February 20, 2004, the trial court found that Mr. Panetti had made a substantial showing of incompetency and, in accordance with the statute, appointed two mental health professionals, Mary Anderson, a psychiatrist, and George Parker, a clinical psychologist, to exam Mr. Panetti. The court-appointed experts examined Mr. Panetti jointly and co-authored a report. They concluded that Mr. Panetti was competent, because he knew that he was to be executed and he had the ability to understand the reason for his execution.

Mr. Panetti sought the appointment of counsel, funds to hire a mental health expert, and funds to hire an investigator. He also asked the state court to hold a hearing, as required under Article 46.05.[10] On May 26, 2004, the state court concluded that Mr. Panetti "ha[d] failed to show, by a preponderance of the evidence, that he is incompetent to be executed."

The federal district court held that the state court, by failing to hold a hearing, had violated the minimal procedural due process requirements of *Ford*. The district court ordered an evidentiary hearing and granted Mr. Panetti's motion for appointment of counsel, motions for funds for expert and investigative assistance, and motion for discovery. In September 2004, the district court held the evidentiary hearing. Counsel for Mr. Panetti presented the testimony of four mental health experts. The State of Texas presented the testimony of three death row correctional officers and the two mental health experts, Dr. Parker and Dr. Anderson, appointed in the state court proceedings.

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[10] Once an inmate has made a substantial showing of incompetency, not only must the trial court appoint at least two mental health experts, but it also must eventually hold a "final competency hearing" before it makes a determination of the inmate's competency to be executed. TEX. CODE CRIM. PROC. art. 46.05(k).

Counsel for Mr. Panetti first called Mary Alice Conroy, a forensic psychologist who had worked for twenty years with the Federal Bureau of Prisons evaluating and treating prisoners with severe mental illness. Dr. Conroy testified that Mr. Panetti suffers from a form of schizophrenia called schizoaffective disorder. She said that "his thinking does not fit together in any kind of logical, rational way," and that his symptoms include pressured speech, flight of ideas, loose associations, and inappropriate affect. 1 FH 14, 21-22. Dr. Conroy testified that Mr. Panetti knows he is on death row and that the State intends to execute him. She said that he is aware that the State wants to put him to death for murdering his parents-in-law, but that he believes "that's really a sham." *Id.* at 25. According to Dr. Conroy:

> His understanding of why he is to be executed is a part of spiritual warfare, and that spiritual warfare is war between the demons and the forces of the darkness, and God and the angels and the forces of light, which he said there are angels but they do not have wings. He pointed that out several times. And the reason that the State wants to kill him is not what they're saying.

Id. Dr. Conroy testified that, although Mr. Panetti can at times answer concrete questions, he does not "perceive or appreciate the connection between his killing of his in-laws and his execution." *Id.* at 26.

Susana A. Rosin, a psychologist, testified that Mr. Panetti has a set of fixed delusions that center around grandiose ideas that he must save others by preaching the word of God. Dr. Rosin testified that Mr. Panetti could hold a normal conversation if the topic of discussion did not deal with his fixed delusional system. She believed that he knows he is on death row and that he is going to be executed. Dr. Rosin also testified that Mr. Panetti knows he killed his parents-in-law. However, he told her that he did not believe these murders are the real reason the State seeks his execution.

Mr. Panetti told Dr. Rosin that "he was going to be executed for preaching the gospel" and that "the forces of evil, demons, devils are basically set against him." *Id.* at 82, 89-90.

The last witness counsel for Mr. Panetti called during its case-in-chief was Seth Silverman, a psychiatrist. Dr. Silverman testified that Mr. Panetti believes an individual named "Sarge" killed his parents-in-law. Dr. Silverman said that Mr. Panetti knows the State wants to execute him, but that these murders are not the reason. Mr. Panetti told Dr. Silverman that the real reason is "[b]ecause he preaches the word of the gospel." *Id.* at 109-10.

Dr. George Parker, the psychologist whom the state court had been appointed for the Article 46.05 proceedings, testified that he attempted, along with Dr. Mary Anderson, to evaluate Mr. Panetti. According to Dr. Parker, Mr. Panetti refused to cooperate with the evaluation, because Dr. Parker and Dr. Anderson would not answer his question about their religious preferences. Dr. Parker admitted that Mr. Panetti suffered from "serious psychological problems." *Id.* at 134. He also testified that Mr. Panetti had the ability at times to function in a coherent manner. *Id.* at 140. Dr. Parker testified that simply because "Mr. Panetti is preoccupied with religion and may even, at some level, genuinely believe that he is being executed for preaching the gospel," does not "render him incapable of understanding why the authorities have ordered his execution." *Id.* at 142. Dr. Parker admitted, however, that he does not know whether Mr. Panetti understands why he is going to be executed, "but that he is capable of understanding." *Id.* On cross-examination, Dr. Parker testified that Mr. Panetti said he was on death row because "they don't want me to preach the word of God." *Id.* at 150.

The other expert the State called was Mary Anderson, the forensic psychiatrist who had examined Mr. Panetti in state court. Dr. Anderson testified that she did not make a conclusion about

whether Mr. Panetti is competent to be executed. She explained that Mr. Panetti was not cooperative with the evaluation: He would not answer her and Dr. Parker's questions, because they had refused to respond to Mr. Panetti's question whether they believed in Jesus. Mr. Panetti told Dr. Anderson that he is going to be executed for preaching the gospel. However, Dr. Anderson believed that Mr. Panetti had the capacity to understand the real reason why he is going to be executed. She said that Mr. Panetti's refusal to cooperate with the evaluation was the result of deliberate, conscious choice rather than the product of mental illness. She refused to conclude that Mr. Panetti suffers from schizophrenia, because she did not think that his mental illness is relevant to the competency determination. 2FH 40-41.

Counsel for Mr. Panetti called Mark Cunningham, a clinical and forensic psychologist, as a rebuttal witness. Dr. Cunningham testified that the conclusions of Dr. Parker and Dr. Anderson that Mr. Panetti was deliberately uncooperative were not a fair characterization of his behavior. Dr. Cunningham explained that Mr. Panetti has a lengthy history of responding to questions with religiosity rather than concrete answers. Dr. Cunningham said that Mr. Panetti did not behave in a fundamentally different way with Dr. Parker and Dr. Anderson than he has with numerous other persons throughout the criminal proceedings. Emphasizing that Mr. Panetti's behavior is entirely consistent with his diagnosis, Dr. Cunningham explained the nature of schizophrenia:

> [Y]ou have to understand that when somebody is schizophrenic, it doesn't diminish their cognitive ability. It doesn't make them retarded where they don't know where the door is, don't know you're a doctor, don't understand that these are corrections officers. It doesn't render them stupid.
>
> Instead, you have a situation where – and why we call schizophrenia thought disorder is the logical integration and reality connection of their thoughts are disrupted, so the stimulus comes in, and instead of being analyzed and processed in a rational, logical, linear sort of way, it gets scrambled up and comes out in a tangential, circumstantial,

> symbolic sort of relevant, not really relevant kind of way. That's the essence of somebody being schizophrenic.
>
> And so, when I encounter somebody like that and they respond in that way, they're behaving like somebody who is unmedicated, untreated schizophrenic, and that's what they can do under these demand characteristics. Now, it may be that if they're dealing with someone who's more familiar, if they're inside their own cell, where they spend 23 hours a day and have for years, and what may feel like a safer, more enclosed environment for them – and we're talking through this little screen in the door about their commissary, or about whether they're going to come out for a visit, that these sorts of interactions may be reasonably lucid whereas a more extended conversation about more loaded material would reflect the severity of his mental illness.

2 FH 63-64.

Dr. Cunningham testified that Mr. Panetti believes the State of Texas is not acting as a lawfully constituted authority in seeking his execution. Instead, according to Dr. Cunningham, Mr. Panetti thinks that the State "is in league with the forces of evil to prevent him from preaching the gospel." *Id.* at 70. Dr. Cunningham identified this as a "specific delusional belief," consistent with Mr. Panetti's "long-standing delusions of religiosity" and diagnoses of schizophrenia and schizoaffective disorder. *Id.*

H. Evidence of Mr. Panetti's Deteriorating Condition

At the federal evidentiary hearing, Mr. Panetti's expert witnesses unequivocally stated that Mr. Panetti's mental condition has deteriorated since a jury found him competent to stand trial. Dr. Conroy attributed his deterioration to the fact that he has not been on any kind of psychotropic medication since his "April Fool's Day revelation" in 1995. Dr. Silverman also testified that Mr. Panetti was more lucid, coherent, and logical when he took his medication. He stated that Mr. Panetti's mental illness "has progressed more significantly" since he stopped taking his medication

in 1995. 1 FH 117. Noting the type and amount of medication that Mr. Panetti was taking on a daily basis prior to his pre-trial competency hearings, Dr. Silverman explained that:

> I can't imagine anybody getting that dose waking up for two to three days. You cannot take that kind of medication if you are close to normal, without absolutely being put out. And when you wake up, you can't think. You have kind of like the lights on, nobody's home. It just doesn't happen. And he, actually, before that had to be put on 32 milligrams of Stelazine and then, Trilafon. He got that regularly, and he was still walking and talking. You would have to be extremely psychotic just to tolerate it and then, benefit from it. To me, that's almost diagnostic – that is diagnostic of a psychotic illness.

Id. at 122. Dr. Silverman concluded that the lack of medication in a case like Mr. Panetti's would most likely lead to "a more severe refractory kind of illness." *Id.* at 125.

HOW THE ISSUES WERE DECIDED BELOW

On September 29, 2004, the district court denied relief on Mr. Panetti's claim of incompetency to be executed under *Ford v. Wainwright*, 477 U.S. 399 (1986). *Panetti v. Dretke*, 401 F. Supp.2d 702 (W.D. Tex. 2004). The court, with some reluctance, concluded that *Barnard v. Collins*, 13 F.3d 871 (5th Cir. 1994), controlled the outcome. In *Barnard*, the Fifth Circuit set out the state habeas court's findings of fact:

> Applicant's experts do not establish that he is unaware of the fact of or the reason for his impending execution, but rather that his perception of the reason for his conviction and pending execution is at times distorted by a delusional system in which he attributes anything negative that happens to him to a conspiracy of Asians, Jews, Blacks, homosexuals, and the Mafia.

Id. at 876. The Fifth Circuit concluded that these findings were entitled to the presumption of correctness and held that "[t]he state court thus found that Barnard knew that he was going to be executed and why he was going to be executed – precisely the finding required by the *Ford* standard of competency." *Id.* at 877. In *Panetti*, the district court questioned the *Barnard* court's statement

that it had applied Justice Powell's concurring opinion in *Ford* as the appropriate standard for determining competency for execution:

> Although the court stated it was following the Powell concurrence in reaching its conclusion that the standard for competency had been satisfied, it did not even suggest the presence of an issue with respect to its "retributive goal" aspect. Had the court determined the "retributive goal" inquiry was required, the result it reached may have been different. At the very least, the state court's findings with respect to the petitioner's delusions would have given rise to an arguable issue about whether his understanding of the reason for his execution was so distorted that the retributive goal of the law would not be satisfied by his execution.

Panetti, 401 F. Supp.2d at 711. Bound by *Barnard*, the district court concluded that "a petitioner's delusional beliefs – even those which may result in a fundamental failure to appreciate the connection between the petitioner's crime and his execution – do not bear on the question of whether the petitioner 'knows the reason for his execution' for purposes of the Eighth Amendment." *Id.* at 712. Consequently, the district court held: "Because the Court finds that Panetti knows he committed two murders, he knows he is to be executed, and he knows the reason the State has given for his execution is his commission of those murders, he is competent to be executed." *Id.*

On May 9, 2006, the Fifth Circuit affirmed the district court's decision. *Panetti v. Dretke*, 448 F.3d 815 (5th Cir. 2006). Noting that *Barnard* was "nearly identical" to Mr. Panetti's case, the court held that "Justice Powell did not state that a prisoner must 'rationally understand' the reason for his execution, only that he must be 'aware' of it." *Id.* at 819; *see id.* at 821 (holding that "'awareness,' as that term is used in *Ford*, is not necessarily synonymous with 'rational understanding'"). Therefore, the Fifth Circuit concluded, Mr. Panetti is competent to be executed, because even though he may lack a rational understanding of the reason for his execution, he is "aware" of the reason the State has given for his execution. *Id.* at 821.

REASONS THE WRIT SHOULD BE GRANTED

THE FIFTH CIRCUIT HAS INTERPRETED *FORD V. WAINWRIGHT* SO NARROWLY THAT THE EIGHTH AMENDMENT DOES NOT PROTECT THE INSANE FROM BEING EXECUTED IN TEXAS.

> I've got one thing to say, get your Warden off this gurney and shut up. I am from the island of Barbados. I am the Warden of this unit. People are seeing you do this.
>
> – Last Statement of Monty Delk, executed in Texas on February 28, 2002.
>
> Statement to what[?] State what[?] I am not guilty of the charge of capital murder. Steal me and my family's money. My truth will always be my truth. There is no kin and no friend; no fear what you do to me. No kin to you undertaker. Murderer. [Portion of statement omitted due to profanity] Get my money. Give me my rights. Give me my rights. Give me my rights. Give me my life back.
>
> – Last Statement of Kelsey Patterson, executed in Texas on May 18, 2004.
>
> For today, no less than before, we may seriously question the retributive value of executing a person who has no comprehension of why he has been singled out and stripped of his fundamental right to life.
>
> – *Ford v. Wainwright*, 477 U.S. 399, 409 (1986) (majority opinion).

Two decades have passed since this Court decided *Ford*, and the Fifth Circuit has yet to find a ***single*** death row inmate incompetent to be executed. During this same period, the State of Texas has executed 360 people. The execution of Scott Panetti would be but the latest in a growing list of "miserable spectacle[s]" in Texas. *See Ford v. Wainwright*, 477 U.S. 399, 407 (citing 3 E. Coke, Institutes 6 (6th ed. 1680)). The Fifth Circuit has reduced the Eighth Amendment's ban on the execution of the insane into a toothless prohibition. It is unclear who would be protected by the "bare factual awareness" standard the Fifth Circuit began crafting in *Barnard v. Collins*, 13 F.3d 871 (5th Cir. 1994), and completed in *Panetti v. Dretke*, 448 F.3d 815 (5th Cir. 2006). However, it is exceedingly clear that the Fifth Circuit's standard provides far less protection to the insane than the

common law ever did. Despite paying lip service to the *Ford* majority's and Justice Powell's retributive rationale as the basis for prohibiting the execution of the insane, the Fifth Circuit has uncoupled Justice Powell's competency standard from its foundation, leaving only a shell of bare awareness.

As the lengthy Statement of Fact reveals, the state and federal courts have grappled with Mr. Panetti's competency at nearly every stage of the criminal proceedings. The compelling nature of this case – including allowing such a severely mentally ill man to represent himself when his life is at stake – provides this Court with an ideal vehicle to ensure that the Fifth Circuit takes into account the retributive goal of capital punishment when assessing competency for execution. Moreover, Mr. Panetti's case, unlike Harold Barnard's or Monty Delk's or Kelsey Patterson's, is unencumbered by state court findings entitled to the presumption of correctness or legal conclusions entitled to AEDPA deference. In addition, the fallout from the *Barnard* case demands this Court's immediate intervention. Spurred on by *Barnard*, the American Bar Association, the American Psychiatric Association, and the American Psychological Association have all recently adopted resolutions that recognize the need for an inmate to have more than a shallow understanding of the reasons for his execution to ensure that the retributive value of capital punishment will be vindicated while still protecting those persons with biologically-based brain disorders – the severely mentally ill. Finally, this Court should grant certiorari because the Court's "duty to search for constitutional error with painstaking care is never more exacting than it is in a capital case." *Kyles v. Whitley*, 514 U.S. 419, 422 (1995). The execution of a man like Mr. Panetti would not only be "savage and inhuman," *Ford*, 477 U.S. at 406, but it would also offend "the dignity of society itself." *Id.* at 410.

Unfortunately, Mr. Panetti cannot look to clemency as a realistic option in Texas. This Court is his last resort.

A. Because the Fifth Circuit has jettisoned *Ford*'s retributive rationale from the execution competency determination, the Eighth Amendment provides no protection to the severely mentally ill in the nation's busiest death penalty jurisdiction.

This Court must enforce constitutional guarantees – especially in death penalty cases – with particular zeal. The Fifth Circuit, while purportedly adopting Justice Powell's standard for execution competency, has simultaneously undermined *Ford*'s substantive prohibition by refusing to assess an inmate's execution competency in light of the retributive value of capital punishment. It is impossible to reconcile the Fifth Circuit's decisions in *Barnard* and *Panetti* with *Ford*'s explicit recognition that the execution of the insane serves no retributive purpose. The Fifth Circuit's "bare factual awareness" standard carves the heart out of Justice Powell's standard and leaves only the husk – the two-pronged, limited, just-the-bare-facts inquiry.

Numerous commentators agree that a "bare factual awareness" standard will not protect severely mentally ill inmates – those who, at common law, would have been labeled "mad" or "insane" – from execution. *See* L. Elizabeth Chamblee, *Time for a Legislative Change: Florida's Stagnant Standard Governing Competency for Execution*, 31 FLA. ST. U. L. REV. 335, 350 (2004) ("[I]f 'understand' merely means that the inmate should possess a bare mental awareness of execution, then many severely mentally ill people will be deemed competent."); Lindsay A. Horstman, *Commuting Death Sentences of the Insane: A Solution for a Better, More Compassionate Society*, 36 U.S.F. L. REV. 823 (2002)("[D]efining sanity as merely having the ability to understand one's crime and fate does not account for the complexities involved with diagnosis and treatment

of mental illness."); John L. Farringer, *The Competency Conundrum: Problems Courts Have Faced in Applying Different Standards for Competency to be Executed*, 54 VAND. L. REV. 2441, 2490 (2001) ("Mere knowledge or awareness of an impending execution, without a rational understanding of the reasons for it, is not sufficient to find competency to be executed. Evidence from an expert witness that the person is so deluded that he or she simply cannot relate the crime to the punishment is evidence of such lack of a rational understanding."); *see also Vargas v. Lambert*, 159 F.3d 1161, 1174 (9th Cir. 1998) (Kleinfeld, J., dissenting) ("Mental illness is not binary, such that one is entirely healthy, or so insane that he can do nothing; it is a continuum, like physical illness"). In the Fifth Circuit's view, the *Ford* majority's reliance on retribution as a substantial part of its rationale for banning the execution of the insane, as well as Justice Powell's decision to craft his execution competency standard based on similar reasoning, is entirely extraneous. The Fifth Circuit's crabbed interpretation of *Ford* has not saved a single inmate from the gurney in 20 years. Justice Powell and the *Ford* majority intended the Eighth Amendment's ban to be more than an empty formality that would provide no protection to severely mentally ill death row inmates like Harold Barnard, Monty Delk, Kelsey Patterson, and Scott Panetti.

The Fifth Circuit expressly adopted Justice Powell's execution competency standard. In *Lowenfield v. Butler*, 843 F.2d 183 (5th Cir. 1988), the court repeated verbatim the heart of Justice Powell's opinion:

> If the defendant perceives the connection between his crime and his punishment, the retributive goal of the criminal law is satisfied, and only if the defendant is aware that his death is approaching can he prepare himself for his passing. Accordingly, I would hold that the eighth amendment forbids the execution only of those who are unaware of the punishment they are about to suffer and why they are to suffer it.

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Id. at 187 (quoting *Ford*, 477 U.S. at 422 (Powell, J., concurring)). The first sentence summarizes the two common law justifications for barring the execution of the insane that Justice Powell believed still retained their merit. *See Ford*, 477 U.S. at 419-21. The second sentence simply announces the standard that he formulated to take into account those common law concerns.

The portion of the *Ford* opinion that Justice Powell joined to form a majority also recognized the importance of the retributive rationale as a reason for the common law rule against executing the insane. *See id.* at 408 (noting that "the community's quest for retribution – the need to offset a criminal act by a punishment of equivalent moral quality – is not served by execution of an insane person, which has a lesser value than that of the crime for which he is to be punished") (internal quotation marks omitted); *id.* at 409 (recognizing that "we may seriously question the retributive value of executing a person who has no comprehension of why he has been singled out and stripped of his fundamental right to life").[11] Consequently, a condemned inmate must have a real appreciation of the proposition "that, because he has committed an act that society and all civilized humanity finds heinous, he is to be killed." *Martin v. Dugger*, 686 F. Supp. 1523, 1568-70 (S.D. Fla. 1988).

Barnard stands in stark contrast to *Lowenfield*. *Barnard* simply lifts from Justice Powell's opinion only the sentence that sets out the standard, and disconnects its from the retributive goal rationale. 13 F.3d at 876 n.2. *Barnard*'s application of the standard to the facts, without taking into account Justice Powell's underlying rationale, renders the competency determination virtually meaningless. *Cf. Barnard*, 13 F.3d at 876 ("Applicant's experts do not establish that he is unaware

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[11] Tellingly, the Fifth Circuit mistakenly attributed the retributive value rationale for barring the execution of the insane to only a plurality of the Court in *Ford*. *See Panetti*, 448 F.3d at 818. However, Justice Powell joined Parts I and II of Justice Marshall's opinion – where the retributive value discussion appears – making it a majority opinion. *See Ford*, 477 U.S. at 401; *id.* at 418 (Powell, J., concurring in part and concurring in the judgment).

of the fact of or the reason for his impending execution, but rather that ***his perception of the reason for his conviction and pending execution is at times distorted by a delusional system*** in which he attributes anything negative that happens to him to a conspiracy of Asians, Jews, Blacks, homosexuals, and the Mafia.") (emphasis added), *with Ford*, 477 U.S. at 422 (Powell, J., concurring) ("If the defendant ***perceives the connection between his crime and his punishment***, the retributive goal of the criminal law is satisfied . . . .") (emphasis added); *see also Ford v. Wainwright*, 752 F.2d 526, 531 n.3 (11th Cir. 1985) (Clark, J., dissenting) (noting that "the social goal of retribution is frustrated when the power of the State is exercised against one who does not comprehend its significance"), *rev'd*, 477 U.S. 399 (1986).

The moral force of retribution is lost if an inmate believes that his execution is being carried out through a conspiracy of demonic forces rather than as a lawful punishment for a horrific crime. If a death-sentenced inmate does not rationally understand that, when the time for execution arrives, this is the price he must pay for his horrible deed, then society does not get the full benefit of retribution. *See* Robert F. Schopp, *Wake Up and Die Right: The Rationale, Standard, and Jurisprudential Significance of the Competency to Face Execution Requirement*, 51 LA. L. REV. 995, 1039-46 (1991) (arguing that the retributive system of capital punishment is designed to apply exclusively to rational persons who have the cognitive capacities to answer for their conduct). The execution of an insane inmate is a punishment of a lesser value because, in effect, the person being executed is no longer the same person who was convicted and sentenced to death. *See Solesbee v. Balkcom*, 339 U.S. 9, 19 (1950) (Frankfurter, J., dissenting) ("If a man has gone insane, is he still himself? Is he still the man who was convicted?"), *overruled, Ford v. Wainwright*, 477 U.S. 399 (1986); Note, *Insanity of the Condemned*, 88 Yale L.J. 533, 536 n.17 (1979) (arguing that execution

of the insane is executing a person who for all moral purposes is a different person than the one who committed the crime).

The absence of any retributive value in executing the insane – one of the common law justifications for the prohibition – provides the foundation upon which the *Ford* majority based its decision and Justice Powell constructed his standard. The standard collapses if the foundation is removed. Consequently, the Fifth Circuit's adoption of a "bare factual awareness" standard creates an untenable situation: The Eighth Amendment now provides ***less*** protection to the insane in Texas than the common law did. This Court should grant certiorari to ensure that the severely mentally ill in the nation's busiest death penalty jurisdiction have *Ford*'s full protection.

B. The confusion sown by *Barnard* has led the American Bar Association, the American Psychiatric Association, and the American Psychological Association to adopt resolutions intended to remind the courts of the retributive value underpinning of *Ford*.

On August 8, 2006, the American Bar Association passed a resolution addressing the execution of severely mentally ill death-sentenced inmates. In February 2006, the American Psychological Association and, in December 2005, the American Psychiatric Association (APA) approved position statements on the same topic. The ABA's resolution and the position statements of the American Psychiatric and Psychological Associations are identical, stating, in part, that "[a] sentence of death should not be carried out if the prisoner has a mental disorder or disability that significantly impairs his or her capacity . . . to understand the nature and purpose of the punishment, or to appreciate the reason for its imposition in the prisoner's own case." ABA Resolution 122A (adopted Aug. 8, 2006). The APA Commentary to the policy specifically notes the uncertainty created by the Fifth Circuit's decision in *Barnard*:

> There has been some confusion about the meaning of the idea that the prisoner must be able to understand (or be aware of) the nature and purpose for (reasons for) the execution. In *Barnard v. Collins*, decided by the Fifth Circuit in 1994, the state habeas court had found that Barnard's "perception of the reason for his conviction and impending execution is at times distorted by a delusional system in which he attributes anything negative that happens to him to a conspiracy of Asians, Jews, Blacks, homosexuals, and the Mafia." Despite the fact that Barnard's understanding of the reason for his execution was impaired by delusions, the Fifth Circuit concluded that his awareness that "his pending execution was because he had been found guilty of the crime," was sufficient to support the state habeas court's legal conclusion that he was competent to be executed.

American Psychiatric Association, *Mentally Ill Prisoners on Death Row*, Commentary on Position Statement (Dec. 2005) (footnotes omitted).[12] The APA Commentary then states:

> In order to emphasize the need for a deeper understanding of the state's justifying purpose for the execution, [the APA] would require that an offender not only must be "aware" of the nature and purpose of punishment but also must "appreciate" its personal application in the offender's own case – that is, why it is being imposed on the offender. This formulation is analogous to the distinction often drawn between a "factual understanding" and a "rational understanding" of the reason for the execution. If, as is generally assumed, the primary purpose of the competence-to-be-executed requirement is to vindicate the retributive aim of punishment, then offenders should have more than a shallow understanding of why they are being executed.

Id. (emphasis omitted, footnote omitted). The APA Commentary is drawn directly from an earlier report produced by the ABA's Task Force on Mental Disability and the Death Penalty. The decision by the ABA and the American Psychiatric and Psychological Associations to adopt this policy demonstrates that the confusion created by *Barnard* is pervasive and serious. This Court should grant certiorari, emphatically repudiate the interpretation of *Ford* found in *Barnard* and *Panetti*, and provide guidance to the lower courts on a recurring issue.

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[12] *See* http://www.psych.org/edu/other_res/lib_archives/archives/200505.pdf.

C. Mr. Panetti's case presents an ideal vehicle for this Court to ensure the Fifth Circuit's compliance with *Ford*.

For several reasons, Mr. Panetti's case is a particularly appropriate vehicle for rejecting the Fifth Circuit's assessment of execution competency. First, the facts surrounding Mr. Panetti's severe mental illness and its effects on his cognitive functioning are compelling and undisputed. Several commentators have focused specifically on his case as an egregious example of the lower courts' reluctance to use *Ford* to protect the profoundly mentally ill. *See, e.g.*, Richard J. Bonnie, *Mentally Ill Prisoners on Death Row: Unsolved Puzzles for Courts and Legislatures*, 54 CATH. U. L. REV. 1169, 1173 (2005); Ronald S. Honberg, *The Injustice of Imposing Death Sentences on People with Severe Mental Illnesses*, 54 CATH. U. L. REV. 1153, 1163-64 (2005); *see also* Ralph Blumenthal and Adam Liptak, *Judging Whether a Killer is Sane Enough to Die*, N.Y. TIMES at 1A (Jun. 2, 2006). Second, the lower courts relied exclusively on the controversial decision in *Barnard* as the controlling precedent in Mr. Panetti's case. Mr. Panetti's case presents the "bare factual awareness" issue starkly and cleanly. Third, unlike *Barnard*, *Delk*, or *Patterson*, Mr. Panetti's case does not require this Court to wade through a thicket of procedural barriers before reaching the merits. The presumption of correctness does not apply to the state court's findings of fact in Mr. Panetti's case and the state court's legal conclusions are not entitled to AEDPA deference. The district court held an evidentiary hearing and conducted de novo review of the *Ford* claim, because the state court refused to hold a hearing after finding that Mr. Panetti had made a substantial showing of incompetency. *Panetti*, 401 F. Supp.2d at 705-06. This Court should grant certiorari either to clarify the role the retributive goal rationale plays in assessing the execution competency of the severely mentally ill or simply to correct the error the Fifth Circuit made in Mr. Panetti's case by ignoring it.

CONCLUSION

The Court should grant certiorari and schedule this case for briefing and oral argument to ensure the Fifth Circuit's compliance with *Ford v. Wainwright*.

Respectfully submitted,

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BY:_____

September 6, 2006

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2005

SCOTT LOUIS PANETTI,

Petitioner,

V.

NATHANIEL QUARTERMAN,
Director, Texas Department of Criminal Justice,
Correctional Institutions Division,

Respondent.

CERTIFICATE OF SERVICE

I, Keith S. Hampton, hereby certify that a true and correct copy of Petitioner's Petition for Writ of Certiorari was served on counsel for Respondent on this 6th day of September 2006, via First Class United States Mail, addressed to:

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APPENDIX A

APPENDIX B

APPENDIX C